

[END PROPRIETARY DATA].

Cable also is a viable alternative to the ILECs' high-capacity facilities. Although AT&T insists that "[w]ith few exceptions, cable infrastructures generally do not 'pass' business locations and thus cannot readily serve the vast majority of office buildings and other business sites,"⁸⁴ the truth is otherwise. According to industry analysts, between 45 to 48 percent of small office/home office and small businesses use cable modems as their telecommunications solution of choice; this number is expected to grow to more than 60% in the near future.⁸⁵

In short, there are numerous competitive alternatives for high-capacity loops and transport and dark fiber. In light of such clear and convincing evidence, the Commission cannot lawfully re-institute its findings of national impairment with respect to high-capacity loops, transport, and dark fiber, notwithstanding CLEC claims to the contrary.⁸⁶

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⁸⁴ AT&T Comments at 76.

⁸⁵ Tipton Reply Affidavit, ¶ 5.

⁸⁶ See, e.g., AT&T Comments at 52; MCI Comments at 138.

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**B. CLEC Reliance on Data Developed in the State Impairment
Proceedings Is Misplaced.**

In a misguided attempt to perpetuate unbundling of high capacity facilities in the absence of evidence of impairment, several CLECs invite that the Commission to utilize data gathered during the state impairment proceedings.⁸⁷ The Commission should decline this invitation.

In an attempt to bolster their impairment claims, most CLECs rely upon an "analysis of state specific loop and transport data" prepared by QSI Consulting Inc. ("QSI"). This "analysis" allegedly draws from data developed in 14 state impairment proceedings initiated in response to the *Triennial Review Order* and purports to show, despite overwhelming evidence in this docket to the contrary, that competitive high capacity loops and facilities are allegedly scarce. QSI's "analysis" is misleading and proves nothing.

As an initial matter, assessing impairment based upon data regarding competitive deployment of high-capacity facilities obtained during the state proceedings is not a particularly useful exercise. First, such data were gathered and presented based on an invalid approach to impairment. For example, QSI and several CLECs seek to suggest that certain ILECs have conceded impairment by virtue of their not attempting to establish that the triggers had been met in particular states or not presenting a potential deployment case under the *Triennial Review Order* guidelines. However, the trigger tests in the *Triennial Review Order* cannot be reconciled with *USTA II*, for the reasons explained below. Furthermore, while the Commission expressed its expectation that a finding of no impairment would be made when the evidence in the state proceedings demonstrated "the potential ability of competitive LECs" to compete without

⁸⁷ See, e.g., AT&T Comments at 52-54; CLEC Coalition Comments at 101-02.

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UNEs,⁸⁸ the Commission not only unlawfully delegated to the states the authority to conduct the impairment inquiry, but also, as the ILECs explained, structured the inquiry in such a manner that was "so open-ended that it imposes no meaningful constraints on unbundling, and would be unlawful even if applied by the FCC itself."⁸⁹ Under the circumstances, it is not surprising that some ILECs declined to devote the resources to participating fully in an unlawful process employing an amorphous unbundling standard, and their decision not to do so hardly constitutes an admission of "impairment."⁹⁰

Second, CLECs were less than forthcoming in disclosing information about their deployment of high capacity facilities and intentionally manipulated the process to avoid having to disclose data that they knew would undermine their impairment claims. For example, during the discovery process in BellSouth's region, AT&T denied self-providing transport along a single route in any BellSouth state, which is absurd on its face given the tens of thousands of fiber route miles comprising AT&T's network. AT&T rationalized its refusal to disclose the locations of high-capacity transport by narrowly defining the term to include only facilities directly between two ILEC central offices, contrary to the *Triennial Review Order*. Similarly, other carriers refused to disclose the location of self-provisioned high capacity loops because such facilities did not terminate in an ILEC central office, even though such facilities are being used to serve end-user customers.⁹¹

⁸⁸ *Triennial Review Order*, 18 FCC Rcd at 17299, ¶ 506.

⁸⁹ *USTA II*, 359 F.3d at 571.

⁹⁰ Despite such concerns, BellSouth was an active participant in the state impairment cases, including presenting a potential deployment case for high-capacity loops and transport. MCI's claims to the contrary (at 147) are false. Padgett Reply Affidavit, ¶ 30.

⁹¹ Padgett Reply Affidavit, ¶ 23.

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Even assuming that data obtained in the state proceedings regarding competitive deployment of high capacity facilities were useful in assessing impairment in this docket (which is not the case), such data has been improperly and unfairly manipulated by QSI to reduce artificially the magnitude of competitive deployment. For example, QSI arbitrarily deleted from its analysis routes and locations identified by ILECs if the route or location was not disclosed by a CLEC in a discovery response. However, a number of CLECs never responded to the questions they were asked, and other providers of high-capacity facilities were not even subject to discovery. QSI also “removed” buildings or locations unless the CLEC expressly “acknowledged” that it was self-providing facilities at specific capacity levels, even if it was technically and economically feasible for the CLEC to do so.⁹²

In short, the findings offered by QSI concerning the extent of CLEC owned and operated loop and transport facilities are simply not credible. This is abundantly clear from the limited facts presented by CLECs in this docket, which completely contradict QSI’s “findings.”⁹³ Furthermore, any “findings” by QSI based upon selectively manipulated data presented in 14 state proceedings could hardly be used to make an impairment determination in other markets across the country.⁹⁴

⁹² *Id.*, ¶ 32.

⁹³ For example, according to QSI’s analysis, there are no CLEC self-provided transport routes in either California or Washington. QSI Report at 17 (table 5). However, Advanced Telecom, which operates local fiber networks in four Western states, including California and Washington, readily acknowledges that a substantial percentage of the interoffice routes in its system are self-deployed. Wigger Declaration, ¶ 33.

⁹⁴ For example, QSI claims that it found two or more wholesalers offering DS-1 and DS-3 wholesale loops in only 36 and 49 buildings, respectively, in the states it reviewed. However, the database maintained by Sprint of “Alternative Access Vendors [AAVs], which it defines as “CLECs that offer facilities to other carriers,” includes thousands of buildings that “have potentially two or more AAVs reaching any portion of the building.” Sprint Comments at 46.

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It is no surprise that the CLECs seek to rely upon QSI's seriously flawed "analysis" in an attempt to establish impairment instead of providing the Commission with specific information about their high capacity loop and transport deployment. This is entirely consistent with the approach taken by the CLECs in the state impairment proceedings and is part and parcel of their "hide the ball" strategy.

As evidence of this strategy, the Commission should look no further than the declarations of KMC Telecom and XO, which, by all accounts, are two of the largest facilities-based CLECs in the country. Both companies operate networks consisting of thousands of route miles of fiber optic facilities, yet neither KMC nor XO bothers to provide specific details about these networks. For example, KMC notes that it "has deployed its own transport facilities in established collocations in certain ILEC and IXC central offices," although it fails to disclose where those facilities and collocations are actually located.⁹⁵ Similarly, while noting that extending its "fiber networks directly to large enterprise customers is an important aspect of [its] business plan," KMC fails to disclose the locations of the enterprise customers it serves directly with its own high capacity loop facilities, the specific types of facilities it has self-deployed, or the specific services that such facilities are used to provide.⁹⁶

Similarly, XO admits that it builds its "own fiber optic facilities into a building and create[s] a DS-1 or DS-3 channel connecting to [its] backbone network," but fails to disclose any details about the location or quantity of such facilities.⁹⁷ XO candidly admits that buildings

⁹⁵ Duke Declaration, ¶16.

⁹⁶ *Id.*, ¶ 8.

⁹⁷ Declaration of Wil Tirado on Behalf of XO Communications, Inc., ¶ 6 ("Tirado Declaration"), submitted with Initial Comments of the Loop and Transport Coalition.

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"directly" on its fiber rings can be served with its "own loop facilities."⁹⁸ *Id* at 14. However, again, other than providing a map of its San Francisco fiber ring, XO does not bother offering any details about the number of buildings located directly on its rings deployed in scores of MSAs or the quantity and types of services it provides with its own facilities to its tens of thousands of customers.

The omission of such information is particularly critical, given the markets these carriers service. For example, according to KMC, it has constructed "fiber-based networks in mid-sized cities."⁹⁹ That carriers have self-deployed fiber networks in cities other than the largest metropolitan areas completely undercuts claims that high-capacity transport is only economic on a "handful of extremely high density routes."¹⁰⁰ That such data may be harmful to the CLECs' impairment claims may explain why they have not provided it.

While at the same time withholding detailed information about their networks, CLECs complain that the competitive data presented by BellSouth and the other ILECs are "overstated."¹⁰¹ The CLECs have unique access to information that would allow the Commission to arrive at a more informed impairment analysis, such as the locations where they have self-provisioned high capacity facilities and the locations where they provide service using special access or facilities leased from other carriers. The CLECs should have provided such information to the Commission but instead chose not to do so. BellSouth and the other ILECs have presented available data to demonstrate the extent of competitive deployment. While the

⁹⁸ *Id.*, ¶ 14.

⁹⁹ Duke Declaration, ¶ 5.

¹⁰⁰ AT&T Comments at 25.

¹⁰¹ *See, e.g., id.* at 71.

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data understates alternative deployment, it certainly is reasonable and can be relied upon by the Commission.¹⁰²

Despite pleas by carriers for a return to the days of the Commission's "ordering unbundling first and finding impairment later," those days are long over.¹⁰³ The Commission cannot lawfully order that high-capacity loops, transport, and dark fiber be unbundled unless there is substantial evidence that CLECs are impaired without unbundled access to such network elements. No such evidence has been presented by the CLECs, which have opted instead to withhold relevant information that is likely fatal to their impairment claims.¹⁰⁴

¹⁰² BellSouth utilized information provided by GeoResults, which reviews data in Telcordia's Central On-Line Entry System ("CLONES") database of CLLI codes. Although AT&T claims that the CLONES database does not indicate whether the service in question "is provided via CLEC-owned fiber or via ILEC special access services," (Declaration of Jeffrey D. Beemon on Behalf of AT&T Corp., ¶ 4 ("Beemon Declaration")), this information can readily be determined from various fields in the database. Padgett Reply Affidavit, ¶ 34. AT&T also suggests that the CLONES database contains "obsolete data." Beemon Declaration, ¶ 5-8. But the fact that equipment and facilities may not be "in active use" does not alter the fact that fiber and equipment have been deployed and are still in place and could be used to provide service at any time. Padgett Reply Affidavit, ¶ 35.

¹⁰³ AT&T continues to cling to the fanciful notion that the Commission can require unbundling even in the absence of impairment because of "administrability concerns." AT&T Comments at 25-26. Unfortunately for AT&T, the D.C. Circuit has rejected such an approach. *See USTA II*, 359 F.3d at 579-80 (expressly rejecting CLECs' claims that the Commission can "order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved").

¹⁰⁴ Although Sprint insists that CLECs have an "incentive" to disclose specific data about their competitive networks, (Sprint Comments at 29), the CLEC comments and declarations filed in this proceeding, which are generally devoid of any specific information, suggest otherwise. Furthermore, Sprint maintains a comprehensive database that identifies the location of tens of thousands of buildings where CLECs offer facilities to other carriers, but Sprint has declined to provide the Commission any detailed information from this database, with the exception of a high-level summary. Sprint Comments at 46, Appendix A.

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**C. Impairment for High Capacity Facilities Must Be Analyzed
Consistent with Competitive Entry.**

**1. MSA or wire center level impairment analysis is
appropriate.**

In analyzing impairment, the Commission must identify the relevant geographic markets, which should be defined in a manner consistent with competitive entry.¹⁰⁵ The evidence in the record conclusively demonstrates that competitors seeking to provide high capacity services enter broad geographic markets, such as Metropolitan Statistical Areas ("MSA") by initially placing facilities to serve key business customers in multiple wire centers. This is clear from the declarations of several CLECs in this proceeding.¹⁰⁶ Because competitors enter a market to provide high capacity facilities on a broad geographic basis, the geographic market for purposes of analyzing impairment for high capacity loops, transport, and dark fiber must be judged at either the MSA or wire center level.¹⁰⁷

**2. Impairment should be analyzed based upon business
line concentration.**

In its initial comments, BellSouth proposed that the Commission find that CLEC are not impaired without access to unbundled high capacity loops, transport, and dark fiber in central

¹⁰⁵ *USTA II*, 359 F.3d at 574 ("[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment" occurs); *See also USTA I*, 290 F.3d at 426 (the Commission must adopt "a more nuanced concept of impairment than" one that is "detached from any specific markets or market categories").

¹⁰⁶ Advanced Telecom defines the markets it has entered as "distinct cities within the four states in which Advanced Telecom has both facilities-based network coverage and field operations personnel." Wigger Declaration, ¶ 12. *See also* Kunde Declaration, ¶ 3 (noting the cities and "tier I and II markets" in which Escelon currently offers service); Tirado Declaration, ¶ 2 (noting the facilities that XO uses to serve numerous "metro area markets"); Duke Declaration, ¶ 3 (noting the facilities used by KMC to serve numerous "metro area markets").

¹⁰⁷ BellSouth believes that geographic markets may be defined differently for purposes of switching and high capacity facilities, given that a CLEC may deploy a switch to serve a larger geographic area than a CLEC serving with high capacity loop and transport facilities.

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offices with 5,000 or more business lines.¹⁰⁸ Other parties concur with this general approach, recognizing that a sufficient concentration of business lines in a particular geographic market indicates that CLECs are not impaired without unbundled access to certain high-capacity facilities.¹⁰⁹ However, there is disagreement about the requisite level of concentration that should be required.¹¹⁰

For example, the Loop and Transport CLEC Coalition (“CLEC Coalition”) proposes that non-impairment be found for transport between central offices “with at least 50,000 switched access business lines,” provided that the end points of the route are located in the same LATA in a top MSA and there are at least four fiber-based collocations at both ends of the route.¹¹¹ Similarly, ALTS proposes that non-impairment be found on interoffice transport in any MSA as long as the transport routes connect “two wire centers with 40,000 business lines and above”¹¹² However, these specific proposals are unsupported by any evidence and are legally misguided.

BellSouth has provided extensive data in support of its high capacity loop, transport, and dark fiber unbundling proposal. This data establish a strong relationship between wire centers with a concentration of 5,000 or more business lines and indicia of actual and potential

¹⁰⁸ BellSouth Comments at 39-50.

¹⁰⁹ See, e.g., ALTS Comments at 82 (“Wire centers serving relatively large concentrations of business lines offer relatively large revenue opportunities to competitors”).

¹¹⁰ See, e.g., Verizon Comments at 82 (proposing elimination of unbundling of high-capacity UNEs in wire centers with 5,000 or more total business lines and for wire centers where business lines account for 30 percent or more of the total lines in those wire centers); SBC Comments at 69-70 (proposing elimination of DS1 transport facilities only between wire centers with 10,000 or more business lines, or between one such wire center and a wire center with between 5,000 and 10,000 business lines).

¹¹¹ CLEC Coalition Comments at 82.

¹¹² ALTS Comments at 81.

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competition (i.e., fiber based collocation arrangements, BellSouth average annual special access revenues, existing CLEC-lit buildings, and CLEC use of special access services to serve end users).

By contrast, the CLECs have presented no evidence in support of their unbundling proposals. For example, the CLEC Coalition presents no data that remotely suggests that its 50,000-business line proposal is reasonable, and it is unclear how this threshold was even developed. Indeed, the declarations of the CLEC Coalition's own witnesses contradict any suggestion that interoffice transport cannot economically be provided except between central offices in the same LATA with 50,000 or more business lines.¹¹³ For example, the fact that KMC has self-deployed interoffice transport between numerous ILEC central offices in various mid-sized cities, which almost certainly do not have 50,000 or more business lines, underscores the arbitrariness of the CLEC Coalition's approach.¹¹⁴ Furthermore, the CLEC Coalition's proposal is legally flawed because it appears to assess impairment only by considering routes that the CLEC Coalition believes feature "construction of interoffice facilities by multiple CLECs," even though competitive entry by multiple providers is not a prerequisite to a finding of non-impairment.¹¹⁵

¹¹³ According to XO's Director of Transport Architecture, Wil Tirado, a route between ILEC central offices in a top 50 MSA with 50,000 or more business lines is but just one "*example*" of dense traffic routes for which there is no impairment. Tirado Declaration, ¶ 38 (emphasis added). Another example, according to Mr. Tirado, would be "routes between two ILEC access tandems," and he readily acknowledges that "competitive supply of interoffice transport facilities" exists on routes serving ILEC central offices with "relatively few business lines," although he claims such routes are "rare." *Id.* The declaration of Dan Wigger, Vice President – Network Engineering and Operations for Advanced Telecom, contains practically identical language. Wigger Declaration, ¶ 44.

¹¹⁴ Duke Declaration, ¶ 5.

¹¹⁵ Compare Wigger Declaration, ¶ 44 (identifying routes where "we see the construction of interoffice facilities by multiple CLECs"), with *USTA II*, 359 F3d. at 575 (critical inquiry in assessing impairment is not whether a market is fully competitive but rather whether CLECs are

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The same flaws undermine ALTS's proposal to use 40,000 business lines as the threshold to determine impairment. ALTS does not offer any data to support the use of this threshold, and the testimony of its own witness indicates clearly that competitive deployment of interoffice transport has occurred in offices with fewer than 40,000 business lines.¹¹⁶

It would have been a simple enough exercise for both the CLEC Coalition and ALTS to present evidence supporting their proposals. For example, they readily could have identified each wire center where their member companies either self-provide high-capacity transport or obtain such transport from another carrier and then obtain the number of business lines in each such wire center. Such data might have verified the reasonableness of establishing a threshold of 40,000 or 50,000 business lines, which likely explains why neither the CLEC Coalition nor ALTS sought to do so.

It is equally telling that neither the CLEC Coalition's nor ALTS's proposals would result in any meaningful unbundling relief, even on the "very dense routes" for which they concede there is no impairment.¹¹⁷ For example, under the CLEC Coalition's proposal, BellSouth would be required to continue providing unbundled interoffice transport on nearly every route in its region because only nine of BellSouth's 1,574 wire centers (0.5%) have 50,000 or more business lines, and only five are in the same LATA (three in the Atlanta LATA and two in the Miami LATA). The same is true under ALTS's proposal because of the 16 BellSouth wire centers with

capable of competing without UNEs - that is, whether "competition is possible" without UNEs in a particular market); *see also* *USTA II* 359 F.3d at 571 (issue in conducting impairment analysis is "whether a market is suitable for competitive supply").

¹¹⁶ Declaration of Rainer Gawlick on Behalf of Lightship Telecom, ¶ 8 ("Gawlick Declaration"), submitted with Comments of ALTS/Blackfoot, *et al.*

¹¹⁷ CLEC Coalition Comments at 82; *see also* AT&T Comments at 25 (admitting that wholesale transport is available "for a handful of extremely high density routes," but not identifying the location of such routes or the size of the wire centers they serve).

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40,000 or more business lines (1%), only two LATAs have more than one such office (six in the Atlanta LATA and three in the Miami LATA).¹¹⁸ The CLECs have constructed their proposals in such a manner that they have no practical limiting effect and result in unbundled interoffice transport continuing to be made available on nearly a ubiquitous basis, which is yet another reason for the Commission to reject such proposals.

**3. A route-by-route or building-by-building impairment
analysis should be rejected.**

The Commission also should reject proposals to define the market based on individual loop arrangements or transport routes.¹¹⁹ Such proposals ignore the evidence in the record, which conclusively demonstrates that competitors do not enter the market on a discrete route-by-route or building-by-building basis. Rather, they design a network to provide service throughout a broad geographic market, which generally comprises an MSA or, at the very least, multiple wire centers, as is apparent from an examination of maps of CLEC local fiber networks.

Several CLECs suggest that defining the geographic market based on a route-by-route or building-by-building basis is consistent with the D.C. Circuit's expectation that the Commission would take a more "nuanced" view of impairment. While the D.C. Circuit placed particular emphasis on a "sensible definition" of the relevant market for conducting impairment analysis, nothing in either *USTA I* or *USTA II* can be read to support a "granular" geographic market definition based on routes or buildings. Rather, the Court of Appeals was simply endorsing a more expansive view of the relevant product market, namely, the inclusion of not merely UNEs

¹¹⁸ Padgett Reply Affidavit, ¶ 59.

¹¹⁹ AT&T Comments at 16; CLEC Coalition Comments at 32-35.

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but also facilities of like functionality, even if offered under different terms and conditions than UNEs.¹²⁰

Defining the market on a route-by-route or building-by-building basis also is not defensible from an economic perspective. Although several CLEC economists claim that, because end-user customers of enterprise loops and transport cannot find feasible substitutes *outside* the point-to-point routes over which they make calls, the geographic market cannot be any larger than those point-to-point routes (or, route-pairs) themselves, the “customer” for impairment analysis purposes is the competitive carrier, not the end user. For the *competitive carrier* that seeks to transport traffic over a particular route, it has the option to seek out alternate routes when the cost to transport on a particular route rises.¹²¹ In fact, it is not uncommon for transport routes to be not direct or point-to-point. In these circumstances, any attempt to define the geographic market as strictly point-to-point route-pairs would be a mistake, since the relevant market should contain all possible direct and indirect routes that could enable the CLEC to feasibly transport its traffic from one point to another.¹²²

Furthermore, a discrete route-by-route or building-by-building impairment analysis is legally problematic. Because the Commission must consider whether a market is suitable for competition, the route-by route or building-by-building analysis is only the first step for the Commission to identify the common elements that make *competition possible* in locations other

¹²⁰ *USTA II*, 359 F.3d at 425 (requiring the Commission “to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation”).

¹²¹ Banerjee Reply Declaration, ¶ 32.

¹²² *Id.*

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than those where actual competition is already occurring.¹²³ Indeed, the process has been made even more complicated by the failure of the CLECs to even identify the routes and buildings where they are already competing.

To illustrate the problem, any point-to-point analysis for loops would have to assess thousands of hundreds of thousands of routes connecting various buildings. A loop is not just a connection between an ILEC central office and the end user premises but also would include connections to each of multiple CLEC fiber networks. And the shortest connection may well be to the CLEC fiber ring that passes through the building. Under the CLECs' approach, the Commission would have to identify all of the various routes, assess the characteristics that are common to each of these routes, and then determine other similar routes where deployment would be economic. This would be a mammoth undertaking that would be difficult, if not impossible to complete in any reasonable period of time.

AT&T falsely argues that defining the geographic market on a route-by-route basis "is not in dispute at all" because special access services are "point-to-point connections," as economists for BellSouth and other ILECs have "repeatedly argued" in other proceedings.¹²⁴ However, even a cursory review of the economic testimony cited by AT&T plainly reflects that BellSouth and the other ILECs' economists have not endorsed a route-by-route geographic market. For example, in the Affidavit of Karl McDermott and William E. Taylor in CC Docket No. 99-24, cited by AT&T, Drs. McDermott and Taylor note the difficulties of applying geographic market concepts to "telecommunications services," but nonetheless opine (§ 12) that

¹²³ See *USTA II*, 359 F.3d at 575 (Commission must consider "facilities deployment along similar routes when assessing impairment").

¹²⁴ AT&T Comments at 16.

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defining the market “on a statewide basis is appropriate.” In the Declaration of Professor Robert Harris in CC Docket 01-337, which also was cited by AT&T, Dr. Harris concluded that “the geographic scope of the market for broadband access is local.” However, Dr. Harris did not address special access and never opined that the geographic market for transport services should be analyzed on a route-by-route basis, notwithstanding AT&T’s suggestion to the contrary.

Finally, some CLECs also seek to justify a route-by-route approach by insisting “offices on both ends of a route must generate substantial originating traffic to make self-deployment economic.”¹²⁵ However, modern fiber optic transport systems are symmetrical in nature. That is, two transmit paths (which can be thought of as being a “send” path and a “receive” path) are established and both paths work at the same time. Because each path has identical “bandwidth” or transmission speed, the economics in determining whether to self-deploy a fiber facility are assessed based on the maximum amount of transmission capacity simultaneously required in total between the end points rather than the direction of the traffic. Thus, the CLEC position that there must be sufficient originating traffic on both ends of a route is incorrect.¹²⁶

4. A capacity impairment analysis should be rejected.

The Commission also should reject proposals to analyze impairment based upon the capacity of the loop, transport, or dark fiber facilities.¹²⁷ Such proposals are unduly restrictive and ignore the manner in which fiber optic networks are deployed.

There is no disagreement that fiber optic systems allow a range of transmission rates, given the application of different electronic equipment attached to the ends of the fiber optic

¹²⁵ Gawlick Declaration, ¶ 11.

¹²⁶ Milner Reply Affidavit, ¶¶ 9-10.

¹²⁷ See, e.g., AT&T Comments at 22; CLEC Coalition Comments at 36.

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strands. The capacity of a working fiber optic system is, in practice, rarely limited to the maximum “throughput” of the fiber optic strands themselves but rather by the maximum transmission speed of the attached electronics.¹²⁸

Carriers typically deploy fiber-optic facilities that can operate at a range of capacities determined by the electronics attached to them. When laying fiber, it makes sense to deploy OCn facilities so that there will be enough bandwidth to handle all traffic on a given route and leave additional capacity available for growth.¹²⁹ The carrier can then attach electronics to subdivide (or “channelize”) the available capacity, activating the amount of capacity and number of channels needed along the route. The electronics used to perform this channelization of OCn facilities into DS-1 or DS-3 facilities are relatively inexpensive, are widely available, and can be quickly installed whenever the carrier has demand for DS-1 or DS-3 services. The fact that the capacity of the facility itself is at the OCn level is therefore independent of the carrier’s ability to provide a dedicated DS-1 or DS-3 service over that facility.¹³⁰

Given the architecture of the fiber optic network, CLEC claims that there are no competing DS-1 transport facilities are both misleading and inaccurate.¹³¹ While it may be true

¹²⁸ Milner Reply Affidavit, ¶ 3; *see also* Gawlick Declaration, ¶ 4 (“When CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of different capacities”).

¹²⁹ Milner Reply Affidavit, ¶ 7. The term “OCn” refers to Optical Carrier where “n” designates the optical carrier level. The optical carrier level “n” is directly related to the quantity of DS3 capacity units the system is capable of handling simultaneously. For example, OC48 systems provide capacity for 48 individual DS3 transmission “pipes.” *Id.*

¹³⁰ Milner Reply Affidavit, ¶¶ 4, 7.

¹³¹ *See, e.g.*, Gawlick Declaration, ¶ 9 (Lightship is “not aware of any alternate providers that offer DS-1 transport in our service areas”); Declaration of Keith Coker on Behalf of NuVox, Inc., ¶ 3 (“Coker Declaration”) (noting that while NuVox “frequently receives solicitations from third-party providers to provide transport services,” it never receives offers “at the DS1 capacity level” and “currently obtains no DS1 level transport from third-party providers to reach customers”).

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that no CLEC has built a fiber optic transport system capable of, at most, a single DS-1 transmission path between two points, this fact is irrelevant in assessing whether a CLEC is impaired without access to unbundled interoffice transport. Modern Synchronous Optical Network (“SONET”) based fiber optic systems (such as those built by CLECs and other facilities-based service providers) can and do allow the transport of DS-1 “envelopes” within higher speed transmission systems. Thus, when a carrier has the need for several DS-1s between two points, those DS-1s may be multiplexed together onto a DS-3 transmission facility, which may include a self-provided DS-3 transport facility or transport facilities obtained from other carriers.¹³²

Whether a CLEC is impaired without access to unbundled DS-1 and DS-3 loops and transport because it may not be economic for the CLEC to provide service only at the DS-1 or DS-3 level asks the wrong question. The critical inquiry is whether a reasonably efficient CLEC is capable of competing without UNEs (i.e., whether “competition is possible”). Thus, the correct question is whether it would be economic for a carrier self deploying high capacity facilities, regardless of capacity, to use those facilities to provide a full range of services, including those at the DS-1 and DS-3 levels. The answer to this question is clearly “yes,” which is fatal to the CLECs’ impairment claims.

¹³² Milner Reply Affidavit, ¶ 8. NuVox insists that it “currently utilizes third-party providers that have built into NuVox’s location and connected to NuVox’s switch,” but claims that “these providers are not utilized to provide DS1 transport for EELs.” Coker Declaration, ¶ 3. Importantly, NuVox does not contend, nor could it, that it is unable to utilize those transport facilities as one component of so-called Enhanced Extended Links (“EELs”) if NuVox chose to do so. In fact, the interoffice component of the EEL is typically a high capacity transmission system that has been “channelized” into discrete DS-1 paths, which could readily be multiplexed into multiple DS3 paths. Indeed, even NuVox concedes that individual EEL transport components (that is, multiple DS-1 paths) may be multiplexed onto the “multiple DS3” paths, which NuVox can and does acquire from competitive providers in at least some instances. Milner Reply Affidavit, ¶ 11.

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**D. CLEC Evidence of “Impairment” Is Unpersuasive and Their Claims
of Competitive Harm If No Impairment Is Found Are Overwrought.**

The CLECs go to considerable lengths in an attempt to demonstrate impairment, offering a variety of cost estimates, provisioning interval data, and business case analyses associated with their individual fiber optic deployment. As a threshold matter, as most parties have agreed, the standard for assessing impairment is from the standpoint of a reasonably efficient CLEC. Based on BellSouth’s analysis of the costs an efficient CLEC should incur, it is economic for CLECs to self-provide high-capacity facilities in numerous circumstances.¹³³

BellSouth’s analysis is borne out by the fact that CLEC deployment of high-capacity fiber networks has continued almost unabated since the passage of the 1996 Act. CLECs have built hundred of networks, serving tens of thousands of buildings and hundreds of thousands of customers. This deployment has occurred, despite there being buildings “protected by historic preservation,”¹³⁴ “discriminatory municipal franchises,”¹³⁵ and cumbersome “legal clearances.”¹³⁶ This impressive track record of competitive fiber deployment belies any suggestion that CLECs are impaired without ubiquitous access to unbundled high-capacity facilities due to allegedly high construction costs, purportedly lengthy installation delays, rights-of-way issues, and other provisioning problems.

The CLEC Coalition also resorts to scare tactics in making their impairment case, claiming that unbundling relief for DS-1 facilities would cause a 25% increase in prices paid by

¹³³ Banerjee Declaration, ¶¶ 81-90.

¹³⁴ AT&T Comments at 58.

¹³⁵ Declaration of James C. Falvey on Behalf of Xspedius Communications, LLC, ¶ 22 (“Falvey Declaration”), submitted with Comments of The Loop and Transport CLEC Coalition.

¹³⁶ Duke Declaration, ¶ 10.

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small and medium-sized businesses and decrease consumer welfare by \$4.9 billion annually.¹³⁷ The fallacy of the CLEC Coalition's reasoning is obvious. First, it is not necessarily the case, as the CLEC Coalition assumes, that special access will be used in every instance when a DS-1 UNE is not available. On the contrary, it may be more economic for a carrier to self-provision DS-1 facilities, obtain such facilities from another provider, or use alternative technologies to meet its customer's needs. The CLEC Coalition's analysis does not take into account any of these options in calculating the price purportedly to be paid by businesses if DS-1 unbundling relief were to be granted.

Second, the CLEC Coalition's analysis presupposes that unbundling relief for DS-1 facilities would be obtained everywhere, which is not something BellSouth or the other ILECs are even requesting. Under BellSouth's proposal, the ILECs would be relieved of providing unbundled access to high-capacity loops, transport, and dark fiber only in wire centers with 5,000 or more business lines. BellSouth has 1574 wire centers region wide, only 429 of which have 5,000 or more business lines (27%). This means that in the vast majority of BellSouth wire centers (1145 or 73%), CLECs would continue to be entitled to purchase unbundled high-capacity loops, transport, and dark fiber from BellSouth.¹³⁸ The CLEC Coalition's dire economic analysis glosses over this very important fact.

E. The Commission Must Consider Special Access Services in Analyzing Impairment to High Capacity Facilities.

1. Competition using special access services is extensive.

¹³⁷ CLEC Coalition Comments at 10.

¹³⁸ Padgett Reply Affidavit, ¶ 57.

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The CLECs do not dispute that they are making extensive use of special access service, nor could they. The evidence is overwhelming that CLECs routinely use special access to offer high-capacity services in competition against the ILEC. In fact, CLECs continue to this day to purchase special access services when they could have purchased UNEs instead.¹³⁹

CLEC use of special access is not limited to meeting “temporary” needs or “where no real alternatives exist to permit them to enter into or expand within a local market,” as some CLECs suggest.¹⁴⁰ BellSouth has identified 106,640 buildings in its territory in which CLECs are serving end users using DS1 circuits, either purchased as special access services, UNEs, or both. In the majority of these buildings, the CLECs are serving end users *exclusively* via special access. BellSouth also took a sample of 15 buildings in which carriers are using both special access and UNEs to provide service; in five of these buildings, there is at least one CLEC that itself is using both UNE and special access DS1s to serve its end users in the same building. This evidence suggests that, even though UNEs are available, carriers have elected to use special access to meet their customer’s needs depending upon the particular situation.¹⁴¹

There is no merit to the argument that the only reason CLECs continue to order special access is because BellSouth not been willing to combine UNEs for CLECs or convert them from special access to UNEs. But BellSouth has made available EEL conversions since October 1999 and has provisioned orders for new combinations of UNEs since approximately February 2000.

¹³⁹ *Id.*, ¶ 12

¹⁴⁰ CLEC Coalition Comments at 37-38.

¹⁴¹ Padgett Reply Affidavit, ¶¶ 6, 72-73. Some carriers claim that commingling and use restrictions may be the reason a carrier elects to use special access instead of UNEs. In the 15 buildings BellSouth examined, in most cases, the carrier had more special access DS1s than UNE DS1s and, in one case, the UNE is a stand-alone DS-1 loop, which is not even subject to the commingling and use restrictions. *Id.*

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The examples provided by the CLEC Coalition of carriers that purportedly have experienced trouble converting combinations of elements to UNEs - XO and Xspedius -- do not even involve requests for conversions of EELs, but rather requests for conversions of stand-alone special access services to stand-alone UNEs. Neither carrier has or is apparently even willing to negotiate terms in its interconnection agreement that would allow for such a conversion.¹⁴²

Notwithstanding CLEC arguments to the contrary, the Commission is not at liberty simply to ignore special access in conducting its impairment analysis.¹⁴³ To do so would violate the D.C. Circuit's directive that the Commission cannot "omit consideration of [ILEC-provided] alternatives in its impairment analysis" and "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."¹⁴⁴ The Court of Appeals could not have been more clear on this point, when it held that "[w]hat the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs."¹⁴⁵

CLECs seek to make much of the fact that special access service is priced higher than UNEs.¹⁴⁶ However, as the Supreme Court ruled, the Commission cannot find impairment simply because of "any increase in cost (or decrease in quality) imposed by denial of a network element."¹⁴⁷ As the D.C. Circuit noted, there is no "need for the Commission to impose the costs of mandatory unbundling" when "competitors have access to necessary inputs at rates that

¹⁴² Padgett Reply Affidavit, ¶ 8.

¹⁴³ ALTS Comments at 10-13; CLEC Coalition Comments at 37-38.

¹⁴⁴ *USTA II*, 359 F.3d at 577.

¹⁴⁵ *Id.*

¹⁴⁶ *E.g.*, AT&T Comments at 93.

¹⁴⁷ *Iowa Utils. Board*, 525 U.S. at 389-90.

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allow competition not only to survive but to flourish.” Indeed, in such circumstances “competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates.”¹⁴⁸

Some CLECs also seek to sidestep the obvious importance of special access to the Commission’s impairment analysis by seizing upon the language in *USTA II* concerning the “risk of ILEC abuses” concerning special access pricing and ease of administration that, according to the D.C. Circuit, “might in principle support a blanket rule treating the availability of ILEC tariffed services as irrelevant to impairment.”¹⁴⁹ However, what might work in principle does not work in practice. As explained in greater detail below, the risk of ILEC abuses and administration concerns are overstated and do not justify ignoring the extensive use of special access in assessing impairment.

2. Special access services offer reasonable and stable rates.

AT&T alleges that BellSouth’s special access services provide “limited rate stability,”¹⁵⁰ suggesting that BellSouth has the ability to raise unilaterally its rates for special access services. AT&T also contrasts special access pricing with rates for UNEs, which, according to AT&T, “provide competitive carriers with the rate stability that they need to make rational entry decisions.” Such allegations make no sense given the structure of BellSouth’s current special access discount plans.

¹⁴⁸ *USTA II*, 359 F.3d at 576, 592. AT&T’s suggestion that the D.C. Circuit “treated special access as irrelevant to impairment determinations for local services” is frivolous. AT&T Comments at 83. The D.C. Circuit’s directive that the Commission “must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired” applies generally to the Commission’s impairment analysis, regardless of the service in question.

¹⁴⁹ *USTA II*, 359 F.3d at 576.

¹⁵⁰ AT&T Comments at 87-88.

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BellSouth currently offers three primary plans to special access customers that provide discounts based on the term length commitment of the plan. These three plans are the Area Commitment Plan (“ACP”), the Transport Payment Plan (“TPP”), and the Channel Services Payment Plan (“CSPP”). Together, these three plans, which cover approximately 80% of BellSouth’s special access revenues, allow special access customers to enter into multi-year contracts for as long as 72 months in the case of ACP or up to 96 months for TPP and CSPP. Of course, the customer can select the length of contract it desires depending on its needs and can elect discounts under a contract as short as one-year under any of these three plans. Regardless of the contract duration, however, the price of services purchased under the ACP, TPP, or CSPP will not increase as long as the contract is in effect. Thus, BellSouth’s special access customers can be assured of enjoying “rate stability” for extended periods of time at the customer’s election, notwithstanding AT&T’s claims to the contrary.¹⁵¹

There is no merit to the CLEC Coalition’s insistence that the “most attractive special access pricing ... is unavailable as a practical matter to CLECs that plan to construct their own facilities as conditions permit.”¹⁵² The “most attractive special access pricing” currently offered by BellSouth is through its ACP, TPP, and CSPP, which can readily be used by any carrier, including one that intends to construct its own facilities at some point in the future. These discount plans are flexible enough to allow a carrier to select the period of time to which it would like to enter into a contract with BellSouth, which could be tailored to bridge the time when the carrier enters the market and when it has deployed its own facilities. The ACP, TPP, and CSPP

¹⁵¹ Starcher Reply Affidavit, ¶ 21.

¹⁵² CLEC Coalition Comments at 61.

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also give carriers options as to which services to purchase under these discount plans such that self-provisioned facilities could readily be exempted.¹⁵³

3. Special access services offer high quality service with performance guarantees.

AT&T makes several very broad claims regarding what it considers to be poor special access performance allegedly received from ILECs. In particular, AT&T alleges that BellSouth: (i) fails to provide firm order confirmations (“FOCs”) for special access services on a timely basis, (ii) frequently misses installation commitments; and (iii) takes too long to repair or restore problem or trouble circuits.¹⁵⁴ AT&T is mistaken, and its claims of alleged “poor performance” by BellSouth in providing special access services are belied by BellSouth’s performance data.

With respect to returning FOCs for special access services, BellSouth’s performance has been outstanding. During the period from May 2002 through August 2004, more than 92 percent of the FOCs from BellSouth to the CLECs/IXCs for DS-1 special access circuits were returned in less than one day. Another 3.3% of the DS-1 ASRs received a FOC in less than 2 days, and an additional 1.4% were returned within a 3 day period. Overall, during this 27-month period, 96% of the FOCs were returned to the CLECs/IXCs within 3 days of receiving the ASRs. This level

¹⁵³ Starcher Reply Affidavit, ¶ 24. Equally without merit is Cbeyond’s claim (Batelaan Declaration ¶ 8) that if it “converted every UNE it currently purchases to special access,” Cbeyond not would qualify for any “tariffed special access volume discounts.” Cbeyond is mistaken. Based on BellSouth’s analysis of the products Cbeyond currently purchases as UNEs from BellSouth in the Atlanta LATA, comparing the tariff rate that would apply if these products were purchased as special access service to the reduced rates that would apply if the special access services were purchased under a discounted contract plan, results in approximately \$1 million in savings that Cbeyond would enjoy if it purchased special access services under a discounted contract plan as opposed to paying tariffed special access rates. While both the discounted and tariffed special access rates are higher than UNE rates, Cbeyond’s suggestion that its only option is to pay tariffed special access rates if UNE high-capacity loops and transport were not available is false. Starcher Reply Affidavit, ¶ 28.

¹⁵⁴ AT&T Comments at 110.

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of performance establishes that BellSouth does not take weeks or months to provide a response for special access service, as AT&T claims.¹⁵⁵

As to meeting its installation commitments, from May 2002 through August 2004, BellSouth provisioned over 98% of all DS-1 special access circuits on time. This is a consistent level of excellent performance that belies any suggestion that BellSouth has “compromised” AT&T’s ability to serve its customers.¹⁵⁶

With respect to AT&T’s allegations about the allegedly “lengthy” period of “time to repair or restore problem or trouble circuits to normal operating levels ...,” BellSouth’s Average Repair Interval for special access circuits averaged 3.35 hours during the period from May 2002 through August 2004, with a low of 2 hours and 43 minutes to a high of 3 hours and 40 minutes. The trouble report rate for these special access DS-1 circuits averaged only 2.4% during this 27-month period. This means that over 97% (100% - 2.4% trouble rate) of the DS-1 special access circuits provisioned by BellSouth received trouble free service in an average month during this period. Again, AT&T’s claims of “compromised” customer service ring hollow.¹⁵⁷

In an attempt to support its unfounded accusations that the special access performance it receives from BellSouth is poor, AT&T seeks to compare Special Access service levels to UNE service levels, claiming that UNE provisioning is “well above the level AT&T receives when it buys special access from the RBOCs.”¹⁵⁸ However, as stated previously, and reflected in the data provided, BellSouth’s performance in special access provisioning has been excellent.

¹⁵⁵ Varner Reply Affidavit, ¶ 11.

¹⁵⁶ *Id.*, ¶ 12.

¹⁵⁷ *Id.*, ¶ 10.

¹⁵⁸ Declaration of Alan G. Benway, Robert G. Holleron, Jeffrey King, Michael E. Leshner, Michael C. Mullan, and Maureen Swift on Behalf of AT&T Corp., ¶ 52.

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Again, from May 2002 through August 2004 over 98% of all DS-1 special access circuits were provisioned on time. Thus, AT&T's reliance upon UNE provisioning to illustrate alleged poor special access performance is misguided, even putting aside the obvious differences between UNEs and special access service.¹⁵⁹

At the end of the day, AT&T's claims of poor special access performance are belied by available data. These data are reported using the metrics endorsed in the 272 Audit of BellSouth by the Joint Federal/State Oversight Team, which verified that BellSouth is providing service to competitors at parity with the service it provides to itself and its affiliates. That BellSouth is providing parity service to its competitors further undermines AT&T's unfounded allegations of "poor" special access performance.¹⁶⁰

¹⁵⁹ Varner Reply Affidavit, ¶ 12. Equally misguided is AT&T's reliance upon a filing made almost three years ago in CC Docket No. 01-321 in which AT&T discussed data from 1998 to 2002 to establish allegedly poor special access performance. Without regard to the accuracy of such data at the time, performance data that is up to six years old is seriously outdated and proves nothing. This is particularly true when more recent data is available which reflects that BellSouth provisioned over 98% of all DS-1 special access orders on time with a 97% trouble free rate for the period from May 2002 through August 2004. Varner Reply Affidavit, ¶ 12.

¹⁶⁰ Varner Reply Affidavit, ¶ 14. Although AT&T devotes considerable attention to the issue of special access performance measures, it misstates or otherwise omits critical facts in the process. For example, AT&T's claim that BellSouth has "refused to negotiate meaningful performance standards or provide meaningful remedies" is untrue. Although this allegation is premised upon a January 22, 2002 filing by Time Warner and XO Communications in CC Docket No. 01-321, as AT&T is well aware, BellSouth subsequently reached agreement with Time Warner on "meaningful performance standards." In fact, in August 2002, BellSouth and Time Warner filed with this Commission a comprehensive, negotiated proposal to resolve other proceedings. Likewise, AT&T's demand for measures that contain "benchmark performance standards ... rather than the application of the 'parity' standard set forth for UNEs under the Act" is not rooted in any rule or law established by Congress or by this Commission. Rather, it is an attempt by AT&T to legislate performance terms for BOCs for the benefit of CLECs, which are more appropriately handled through CLEC and ILEC negotiations. BellSouth has proposed a comprehensive set of special access measures that are reasonable and are based on suitable parity standards, which will enable the Commission to sufficiently and efficiently evaluate BellSouth's special access performance.

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AT&T's assertion that BellSouth has been unwilling to include performance standards in its special access tariffs is completely false.¹⁶¹ BellSouth's tariffs contain specific standards for service interruptions and installation appointments associated with special access and provide for credits when those standards are not met. For example, BellSouth offers a Service Assurance Warranty on specified special access transport services, which entitles customers who may experience "service interruptions" in such services to receive a credit for a percentage of their monthly recurring charges. In addition, BellSouth offers a Service Installation Guarantee, which is a credit provided to a customer in an amount equal to the non-recurring charges associated with that service should BellSouth fail to meet mutually agreed upon access transport service order installation dates. That AT&T has either intentionally or inadvertently overlooked these tariff provisions is difficult to explain.¹⁶²

**4. Special access pricing and contract terms are not
"anticompetitive."**

AT&T's complaint that BellSouth's special access tariffs "contain exclusionary 'lock-up' provisions that require a carrier to maintain the vast majority of its traffic" with BellSouth is inaccurate. In fact, the primary special access discount plans that BellSouth currently makes available -- the ACP, TPP, and CSPP -- do not require a special access customer to maintain any specific level of traffic on BellSouth's network, let alone the "vast majority" of the CLEC's traffic.¹⁶³

¹⁶¹ AT&T Comments at 112.

¹⁶² Starcher Reply Affidavit, ¶ 27.

¹⁶³ Starcher Reply Affidavit, ¶¶ 7, 9 11. BellSouth previously offered its Transport Savings Plan ("TSP") and Premium Service Incentive Plan ("PSIP"), which provided special access discounts in exchange for a customer's commitment to purchase specified volumes of services for a specified period of time. AT&T is challenging both TSP and PSIP (File No. E8-04-MD-010) before the Commission. While BellSouth fully believes that the terms and conditions associated

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AT&T alleges that BellSouth's special access tariffs contain "poison pills" allegedly "designed to block carriers that subscribe to these tariffed services from using alternatives to compete."¹⁶⁴ Similarly, the CLEC Coalition asserts that BellSouth is "using special access volume and terms [sic] plans as a means to lock facilities-based CLECs out of the market for wholesale services."¹⁶⁵ However, neither AT&T nor the CLEC Coalition bothers to identify any particular provision in ACP, TPP, or CSPP about which they are allegedly concerned. This is not surprising, since customers opting to participate in the ACP, TPP, or CSPP are not required to forego any competitive alternatives as a prerequisite to obtaining the discounts available under those plans.¹⁶⁶

To the extent AT&T and the CLEC Coalition are suggesting that a multi-year term contract is a "poison pill" or is somehow "anticompetitive," they are seriously mistaken. Term contracts are common in the telecommunications industry and have been a mainstay of competition for decades. In fact, AT&T admits (p. 129) that "[a]n important feature of the enterprise market is that large enterprise customers take service under multi-year term contracts." Thus, there is nothing insidious about multi-year term contracts.

The CLECs dispute the notion that special access should be considered when conducting an impairment analysis by alleging they are vulnerable to anticompetitive pricing practices for

with these plans were just and reasonable, BellSouth, nonetheless, voluntarily grand-fathered these discount plans, and new special access customers cannot avail themselves of either plan.

¹⁶⁴ AT&T Comments at 113.

¹⁶⁵ CLEC Coalition Comments at 61.

¹⁶⁶ Starcher Reply Affidavit, ¶ 24.

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special access and, in particular, to price squeeze.¹⁶⁷ The price squeeze bogey is raised almost routinely by carriers that depend on certain ILEC-supplied wholesale services (such as switched and special access) in an attempt to win pricing concessions from regulators, most commonly to force the price of the wholesale service in question down toward incremental cost. As explained more fully in the Reply Declaration of Dr. Aniruddha Banerjee, such price squeeze claims are faulty because: (1) the wholesale service in question is *not* an “essential facility,” which is a prerequisite to any successful price squeeze; and (2) entry barriers to competing in the local market have been lowered, if not eliminated, particularly with the presence of intermodal competition, which renders any attempted price squeeze a useless exercise.

In an attempt to bolster its price squeeze theory, AT&T claims that it “has effectively abandoned providing some types of local private line and Ethernet services,” suggesting that special access pricing by BellSouth and the other ILECs are to blame.¹⁶⁸ While BellSouth is not privy to the reasons for AT&T’s business decisions, any decision by AT&T to cease offering particular services may have more to do with a change in business strategy than special access pricing. For example, AT&T announced in July 22, 2004, a new strategy that involves “concentrating its growth efforts going forward on business markets and emerging technologies, such as Voice over Internet Protocol (VoIP), that can serve businesses as well as consumers,” which, according to AT&T, “plays to AT&T’s strength as an innovator in communications and a leader in serving the complex networking and technology needs of businesses.” It may very well

¹⁶⁷ *Id.* at ¶¶ 111-16; Declaration of Lee L. Selwyn on Behalf of AT&T Corp. at 55-85 (“Selwyn Declaration”).

¹⁶⁸ AT&T Comments at 98-101.

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be that any decision by AT&T to “abandon” private line and Ethernet services is part of this new strategy.¹⁶⁹

Furthermore, putting aside the reasons for its business decisions, it is unclear specifically what services AT&T claims it is no longer offering, as AT&T continues to make available to its customers both private line and Ethernet services. In fact, in recent months, AT&T has issued a series of news releases proudly announcing customer contracts that include frame relay and private line services. AT&T also recently announced that it was expanding its “global networking capabilities” by doubling its “wired Ethernet” locations, proclaiming itself as “a leader of IP networking solutions.” Based on the foregoing announcements, it does not appear that AT&T is telling this Commission and the investing public the same story about its private line and Ethernet business.¹⁷⁰

Certain CLECs also complain that special access services should not be considered by the Commission in conducting its impairment analysis because, after they were granted pricing flexibility for their interstate special access services, ILECs allegedly have raised their prices for those services and thereby earned very high rates of return. The suggestion is that ILECs have only succeeded at doing so because they possess sufficient market power in special access services and that elimination of UNEs would create an untenable situation with hapless CLECs at the mercy of those ILECs. Such charges are impossible to take seriously.

First, despite the allegedly rising special access prices, special access services are used by CLECs on a widespread basis in local exchange markets, sometimes to serve customer locations in combination with UNEs and, at other times, to do so without any accompanying UNEs

¹⁶⁹ Starcher Reply Affidavit, ¶ 29; Exhibit NS-1.

¹⁷⁰ Starcher Reply Affidavit, ¶ 30.